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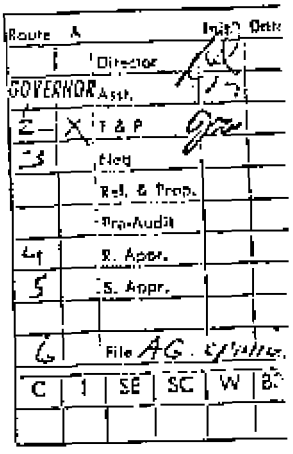
STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / POUCH K — STATE CAPITOL JUNEAU 99801

July 18, 1972



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The Honorable Charles F. Herbert
Commissioner
Department of Natural Resources
Pouch M
Juneau, Alaska 99801

Opinion Regarding Alleged
Accretions-Gastineau Channel
Inter Agency Land Management
Transfers

Dear Commissioner Herbert:

You have requested an opinion in regard to the request of the Department of Highways for an Inter Agency Land Management Transfer (right-of-way) for the construction of the Glacier Valley Expressway, designated by the Department of Highways as project F-095-8(16). It is our understanding the parcels for which they have requested transfers are all situated seaward of the original meander lines of mean high tide along the Gastineau Channel. You further note that several of these parcels appear to be located on accretions of upland owners who have not initiated quiet title proceedings.

You further state that you are not certain as to the State's ownership of the parcels in question, and therefore, the Inter Agency Land Management transfers as requested by the Department of Highways for right-of-way have not yet been accomplished. You have requested this opinion for the purpose of clarifying the State's interest in the parcels in question.

In a landmark case involving tidelands the Supreme Court of the United States after a thorough historical review and a review of cases from a number of jurisdictions, stated in regard to tidelands as follows:1/

1/ Shively v. Bowlby, 152 U.S. 1, 57, 14S. Ct. 548, 38 L.Ed. 331 (1893).

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"The conclusions from the considerations and authorities above stated may be summed up as follows:

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people."

* * *

"Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory."

* * *

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Consititution in the United States."

The State of Alaska acquired all submerged lands within the boundaries of the State under the Alaska Statehood Act 2/, which provided that the Submerged Lands Act of 1953 3/ was applicable to the State of Alaska.

In keeping with the duty imposed on the State in regard to tidelands, the Consitution of the State of Alaska made provision for this property which had formerly been held in trust by the federal government for the future State of Alaska.

2/ The Alaska Statehood Act, 72 Stat. 339, §6(m)

3/ The Submerged Lands Act of 1953, 43 U.S.C.A. § 1301 et seq.

Article VIII, Section 2, of the Constitution of the State of Alaska provides as follows:

> "The Legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including lands and waters, for the maximum benefit of its people." (Emphasis added)

The legislature has enacted various bills in keeping with the above cited provision. In respect to highways, AS 19.05.125 (Supp) recognizes that a highway network is necessary and desirable to provide and improve the development of commerce and industry, as well as the economic and general welfare of the people of the state. AS 19.05.080 provides:

> "The department on behalf of the state and as a part of the cost of constructing or maintaining a highway may purchase, acquire, take over, or condemn under the right and power of eminent domain land in fee simple or easements which it considers necessary for present public use, either temporary or permanent, or which it considers necessary and reasonable for the public use. . . . The department may acquire the land or materials notwithstanding the fact that title to it is vested in the state or a department, agency, commission or institution of the state."

There are similar provisions relating to other public improvements, schools, airports, etc. These demonstrate the legislature's intent to permit the use of state owned lands for the benefit of the people of the state. Such use generally causes the least amount of inconvenience and greatly reduces the cost of right-of-way and other land required for public use.

From the above it is apparent that the transfer requested by the Department of Highways is proper and a public benefit will be realized from the proposed use of this land. The problem arises because of the alleged accretions claimed by upland owners.

The Submerged Lands Act of 1953, supra, § 1301 contains the following definition in subsection (a):

> (a) The term "land beneath navigable waters" means:
>
> (1
>
> (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such

> State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and
>
> (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinbefore defined;"

From the above definitions of "lands beneath navigable waters," land filled in, made by man, or reclaimed from the tidelands does not lose its character as "submerged land" and remains vested in the State. This must be distinguished from accretion which has been defined by the Alaska Supreme Court in the recent case of Schafer v. Schnabel, 4/ as

> " . . . the process by which an area of land along a waterway is expanded by the gradual deposit of soil there due to the action of contiguous waters." (Emphasis added)

The Submerged Lands Act of 1953 vested title to lands purposely and directly filled in by man to the State, even though they would be beyond the meander line of mean high tide and would undoubtedly appear to be accretions as defined in the Schafer case, supra. The language of the Schafer case would appear to contradict that of the Submerged Lands Act in regard to accretions where it states, at page 807

> "It is generally held that it is immaterial whether the deposits derived from natural causes or had an artifical impetus so long as the deposits were gradual."

However, a careful reading of the Schafer case and the cases cited in the opinion, reveals that the court is referring to artifical means of diverting the water which would carry the alluvium, giving artifical impetus to the water, thereby increasing the accretions to the uplands, This meaning is further clarified in the Schafer opinion when they cite with approval as the majority rule, the following language from the United States Supreme Court in the case of County of St. Clair v. Lovingston; 5/

> "The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of water was natural or affected by artifical means is immaterial." (Emphasis added)

Any other interpretation would render meaningless the definition of submerged lands as set out by the Congress of the United States in The Submerged Lands Act of 1953, supra.

4/ Schafer v. Schnable, 494 P.2d 802, 806. (Alaska 1972)

5/ County of St. Clair v. Lovingston, 23 Wall. 46, 90 U.S. 46 66, 23 L.Ed. 59, 63 (1874).

The Courts of the various states have had no problem in rejecting claims of upland owners claiming accretions where the Federal or State government has filled tidelands through dredging, dumping or some other method to utilize the land for a paramount governmental purpose for the benefit of all the people 6/. These cases have established a long standing rule of law for this proposition, and were cited with approval by the Alaska Supreme Court in the Schafer case (supra).

The Department of Highways have requested a transfer of tidelands located seaward of the original meander line as established by the U.S. Surveys. By reason of the Alaska Statehood Act the State acquired all submerged lands as defined in the Submerged Land Act of 1953. The best evidence of what lands in the Gastineau Channel area are submerged lands is the meander line surveys made by the United States, these would be the most reliable as to what submerged lands the United States was holding for the benefit of the future State of Alaska. These surveys were undoubtedly made before any extensive development or improvements had taken place in the Gastineau Channel. The title to the alleged accretions seaward of the original meander line would be vested in the State; however, the State's title would be subject to divestment if the respective upland owners were to bring a quiet title action and prove that the alleged accretions were in fact accretions and an appropriate finding by the court quieting title to said accretions in the upland owners.

As pointed out previously the State holds these lands in trust for the benefit of the whole people, and as trustee it has the responsibility and duty to defend its title to these tidal lands. As pointed out by our Supreme Court in the Schafer case, the owner must prove that the mean high tide has moved seaward of the original U.S. survey's meander line by accretion and his proof must further demonstrate that a gradual deposit of alluvium has taken place by the actions of contiguous waters. This burden of proof is placed on the upland owner, not the State; and until the upland owner has met this burden or proof, the State, as Trustee, must defend its title to these lands.

6/ City of Newport Beach v. Fager, 39 Cal. App. 2d 23, 102 P.2d 436, 442 (Cal App. 1940); Sage v. Mayor or City of New York, 154 N.Y. 61, 47 N.E. 1096, 1103 (N.Y. 1897)

In conclusion, it is the opinion of this office that the Department of Highways should be given the Inter Agency Land Management Transfers which they have requested. The Department of Highways will then have the responsibility of safeguarding and protecting these parcels. If the Department of Highways after investigating the facts surrounding each upland owner's claim of accretions, determines that the claim of accretions is valid, and the owner could meet the burden of proof imposed on him by law; they may then negotiate to acquire the accretion interest of the upland owner.

If this office may be of any further service in regard to this matter, please advise.

truly yours,

JOHN E. HAVELOCK
ATTORNEY GENERAL

By: James F. Petersen

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Assistant Attorney General

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